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1 June 1987

The Hon. William Webster
Director of Central Intelligence
U.S. Central Intelligence Agency
Washington, D.C. 20505

Dear Judge Webster:

Enclosed please find a photocopy of a comment I have submitted to the Central Intelligence Agency regarding the Agency's proposed implementation of the Freedom of Information Reform Act of 1986. Because of your experiences as a Federal judge here, I thought my comment might strike a particularly responsive chord with you. Also, unfortunately, I doubt that you will hear from very many of my colleagues about this matter.

If I may answer any questions about the comment or the issues I raise in it, please do not hesitate to contact me.

Finally, belated congratulations on your new duties. I certainly hope you will be as successful at the CIA as you were at the FBI. I am sure you will have to keep a fairly low profile as DCI, and I will miss your frequent speeches detailing the FBI's latest efforts and exploits to the various groups here in St. Louis.

Sincerely yours,

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1 June 1987

VIA EXPRESS MAIL
Receipt No. B79390573

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Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: **32 C.F.R. Part 1900**
Public access to documents and records; and declassification requests
52 Fed. Reg. 18579 (1987)

Ladies and Gentlemen:

I am writing in response to your request for comments on your proposed rule for implementing the Freedom of Information Reform Act (FOIRA) of 1986. I believe that your proposed rule is unconstitutional and a blatant attempt to subvert the will of Congress. I further believe that the process by which you have handled the proposed rule is illegal under the Administrative Procedure Act, 5 U.S.C. 551, as well as the Freedom of Information Act, 5 U.S.C. 552. I therefore urge you to withdraw the proposed rule immediately, to redraft it completely and to submit the new draft to another round of public comment.

At the outset, I would like to say that I welcome this opportunity to comment on the proposed rule, since I believe the Freedom of Information Act has shown itself to be one of the most important pieces of legislation in our nation's history. I believe it is unfortunate in the extreme that the Office of Management and Budget and the Department of Justice are making such strong efforts to undermine it, and that their ill-founded guidance is being followed by so many agencies.

I write as a full-time newspaper reporter and editor[1] as

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[1] I write solely in my individual capacity, and the views expressed herein are strictly my own.

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well as a freelance writer and editor.2 In both capacities, I am a heavy and consistent user of the Freedom of Information Act [hereinafter "FOIA," "Act," or "the Act."] I have requests and/or appeals pending at approximately 10 offices and offices; in the past, I have sued successfully to obtain material under the Act. My experience with the Act dates to the year of its enactment. I regularly assist in the drafting of FOIA requests, and often discuss FOIA requests and cases with attorneys and other journalists.

Section 1900.25(a) -- Fee waivers

This section is adopted verbatim from the Department of Justice's guidelines,3 which you cite in subsection (4) of this proposed rule. The Office of Management and Budget [hereinafter "OMB"] dropped its draft of this section from its Final Guidelines.4

First, the Justice Department's guidelines have never been published,5 and so that Agency's interpretations, which you do not publish in full, will have no binding effect on the courts.6 Instead of republishing in full and explaining these "guidelines" to educate the public about your fee waiver policy,7 your Agency instead will try to enforce the FOIRA's fee waiver provisions based on the Department of Justice's interpretation of Office of Management and Budget guidelines. However, you can not penalize requesters on the basis of an unpublished interpretive rule.8 Your reliance on these guidelines in this manner shows a disregard for the Administrative Procedure Act.9

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3Memorandum on New FOIA Fee Waiver Policy Guidance, from Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Department of Justice, April 2, 1987.

452 Fed. Reg. 10012, March 27, 1987.

5Such non-publication may be in violation of the FOIA, 5 U.S.C. 552(a)(1)(D) (1966).

6Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

7S. Doc. No. 248, 79th Cong., 2nd Sess. 18 (1946).

8U.S. v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977); Hotch v. U.S., 212 F.2d 280 (9th Cir. 1954).

95 U.S.C. Section 553 (1946).

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Second, your Agency will be collecting information under this subsection without following the proper steps of the Paperwork Reduction Act.[10] Your agency will be intruding into areas which the Constitution protects.[11] Your agency will be deciding what is "newsworthy" by, for example, deciding how informative the information will be about the government[12] and assessing the likely impact of the disclosure on the public's understanding of the subject.[13]

Human nature being what it is, it is difficult to deny the following scenario. The greater the impact of disclosure on the public which a requester explains to you or which you determine on your own, then the greater the temptation will be, at least on a subconscious level, for Agency employees to search for an exemption by which the information can be withheld. Thus, even the "essentially" objective judgments which your employees will make under this section will effectively defeat the purpose of the FOIA by causing the information to be withheld, the fee waiver to be denied and the requester to be hit with a huge search and/or review fee.[14]

Third, U.S. Rep. Glenn English, of Oklahoma, wrote Attorney General Edwin Meese on April 8, 1987, to request that the Justice Department's memorandum be revoked immediately. Congressman English termed the Justice Department's guidance "dishonest," and stated: "The Justice Department has no authority to issue binding guidance on FOIA matters. By deliberately assigning OMB the task of preparing guidelines that are binding on agencies, Congress underscored its lack of confidence in the Justice Department as well as the Department's lack of authority."[15] [Empnasis added.]

Rep. English said also that, "Congress rewrote the FOIA fee waiver rules in order to make more people eligible for waivers ... agency officials who deny fee waivers to qualified requesters will be personally invited to participate in the oversight process. The Justice Department may defend an agency's illegal refusal to grant a fee waiver when it is challenged in court. But the Department will not be there to defend the responsible

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[10] See infra, note 24.

[11] See infra, note 14.

[12] See supra, note 1 at 6.

[13] See supra, note 1 at 9.

[14] Section 268.33(b)(5).

[15] 13 Access Reports/FOI 8, April 22, 1987, at 1-3.

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officials when they are called to testify before my subcommittee."[16]

Fourth, Sen. Patrick Leahy, of Vermont, one of the sponsors of these FOIA amendments, said in April the FOIA remains "the vital link between the people of the United States and their government ... to deter the evolution of government by secrecy." Dollars should not be traded for the value of preserving this cornerstone principle of our system of government.

Fifth, you have proposed that, "The Coordinator may also waive or reduce the charges whenever he determines that the interest of the Government would be served thereby." The "interest[s] of the government" change daily -- often hourly -- and certainly can form no proper, predictable or foreseeable basis for a fee waiver. Indeed, the term lends itself to arbitrary and capricious decision making. Therefore, I strongly urge you to insert the phrase "of the public" into the sentence so that it reads, "The Coordinator may also waive or reduce the charges whenever he determines that the interest of the Government or the public would be served thereby." Such a change clearly would be in concert with the congressional intent behind the FOIA.

In summary, you should redraft this section so that the public interest, in light of the FOIRA's new standard, is accorded a fair and broad-minded deference.

Section 1900.3(q) -- "Representatives of the news media"

You define the term "news" as information that is about current events or that would be of current interest to the public. OMB's guidance here is poor, because such a definition not only requires your employees to make editorial judgments but can also lead to arbitrary results. If it takes several requests and a lawsuit over a few years to compel the release of documents from your agency, will the information still pertain to "current events"? If the information pertains to an event that occurred years ago but is being disclosed for the first time, will that information be of "current interest to the public"? As discussed below, your employees would be impermissibly intruding into constitutionally protected areas if they attempt to define and impose their definition of "newsworthy."

This definition was added to the final draft of OMB's guidelines, and I submit that it is unnecessary. Your wording truncates the definition of "news" that OMB gave in its Final Guidelines: "Recent events and happenings, esp[ecially] those that are unusual or notable ... information about recent events of general interest, esp[ecially] as reported by newspapers,

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[16] Access Reports/FOI, op. cit.

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periodicals, radio or television ..."[17] Since representatives of the news media, a highly competitive field, are in the business of disseminating news, the fact that the requester is a representative should suffice to qualify for the statutory provisions of this class. I urge this sentence be deleted.

Definition of freelance journalists

Your definition of a freelancer is especially worrisome to me for the reasons outlined below. I think your definition should be replaced by a definition that considers only such factors as the past publication record, expertise, ability, intention to disseminate, and/or press credentials of a requester. A freelancer should only have to show a "reasonable basis" -- and not a "solid basis-- for publication.

I. Freelancers should not have to demonstrate a "solid basis for expecting publication"

Your definition of "freelance journalists" as persons "working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it" is a poor and potentially troublesome definition for several reasons.

First, many freelance assignments are initiated after an editor suggests a story idea to a freelancer in which the editor is interested. Freelancers work on the story idea to see what will pan out. Freelancers handle a variety of projects at the same time, and occasionally use their free time to see what they can turn up that might interest some editor, especially one that they have worked with and whose interests are familiar to them. If the freelancer and/or the editor realize after the research that the story is not significant or unverifiable, it is dropped and forgotten, even though the information may eventually be used on another story. Freelancers frequently have no "solid basis" for expecting publication, since this is a determination for the editor and publisher to make ultimately. Whether a freelancer even receives a "kill fee" after the decision has been made to kill a story is also a publisher's decision.

Second, a newspaper or magazine editor might be replaced by one whose interest in a story idea is less than his predecessor. Since freelance assignments are usually given on an oral basis, a freelancer can return from an interview trip and learn his editor is gone and there is little or no documentation that he had a "solid basis" for expecting publication. If your agency learned during the course of processing a FOIA request or appeal that a freelancer's expectation had temporarily fallen apart, would your

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[17] 52 Fed.Reg. 10015 (1987) (emphasis added).

agency then assess retroactively costs against the freelancer? Congress realizes that every story idea does not result in a published story.18

Third, book publishers generally require an outline and at least one draft chapter before they will consider a book for publication. A freelancer can not draw up an outline, let alone write a chapter, without access to documents. Any freelancer desiring to use documents obtained under the FOIA to write a book would find that this proposed rule has placed the cart before the horse, since he would be unable to present any evidence of a "solid basis" without first paying for the documents that he would need to read and write about to show that he had a "solid basis." Surely your agency would not refund fees if a journalist later showed that he had a "solid basis" for publication.

Furthermore, one of the inequities that these FOIA amendments were supposed to correct was the Department of Justice's view that journalists and scholars writing books were engaged in a commercial enterprise and therefore not entitled to fee waivers. This proposed rule puts freelancers and other authors once more outside of the FOIA's special protection of those seeking documents in the public interest. In essence, this proposed rule undoes Congress's work of last fall.

Fourth, and most alarming of all, is that federal officers would be left to determine what constitutes "solid basis." This is not only a vague definition that could lead to arbitrary enforcement, but it could easily lead to discriminatory and punitive harassment of freelancers, many of whom are investigative reporters. Government employees have no right to inquire into the terms of a freelancer's agreement with his publisher, including the focus of his investigation, suggested avenues of inquiry, and the amount of his fee.

Such inquiry, which would be necessary to show a "solid basis," would not only lead to an invasion of the freelancer's privacy but also to an interference with the editorial process.19

18S. Rep. No. 874, 96th Cong. 2nd Sess. 10, Privacy Protection Act of 1980.

19These guidelines would open up the editor-freelancer relationship to government scrutiny to prove that fees should be waived or reduced. The U.S. Supreme Court has analyzed such interference particularly and also the factoring of costs in deciding whether to publish a story: "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the...statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors...The choice of material to go into a

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The worst scenario would be when a freelancer is investigating your agency which then would use the grounds of "solid basis" to learn details of the freelancer's investigation. This would not only have a chilling effect on a freelancer, but it would have a glacial effect on government whistleblowers when they realize that if they talk to a freelancer, instead of reporter with a media organization, your agency can use the FOIA to learn what "solid basis" the journalist has for expecting publication.

Congress and the Department of Justice realize the importance of whistleblowers.[20] History is replete with incidents of federal employees who have misused their offices and powers to prevent investigations into their actions. Congress is concerned about federal agents creating contrived offenses against journalists.[21] Federal employees should not be allowed to determine if a freelancer has a "solid basis for expecting publication."

II. This proposed rule creates classes of "journalists"

Another disturbing part of this proposed rule is that it tries to separate journalists into two classes: Those who work for news organizations or organizations which regularly publish information for the public, and those who are freelancers.

For years, Congress has labored unsuccessfully to define a journalist. That inability is partly responsible for the lack of any federal shield law for members of the press. The Department of Justice has not fared any better in this task. The Department

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newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials...constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Demonstrating a "solid basis" could lead to governmental definition of an "expectation of publication," whose definition is solely the province of editors and never those of federal officers. "(We)...remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." Id., (White, J., concurring).

[20]For Congress's latest effort to protect whistleblowers, see The False Claims Act Amendments of 1986, 31 U.S.C. Section 3734. Congress spelled out its reasons for protecting both public and private sector whistleblowers, citing detailed statutory and case law. S. Rep. No. 345, 99th Cong., 2nd Sess. 34-35 (1986).

[21]S. Rep. No. 874, 96th Cong., 2nd Sess. 11, Privacy Protection Act of 1980.

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of State should look carefully at Congress's most recent effort to provide a special status to the press, the Privacy Protection Act of 1980 (42 U.S.C. Section 2000aa, et seq. (1980)). This Act restricts searches and seizures by state and federal law enforcement agents.

Since Congress could not define the type of person who should be protected from searches and seizures, it instead defined the activity which would trigger the protection. The Act specifically states that it protects materials "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."22 Congress said that its intent was to protect those engaged in First Amendment activities.23

Congress explained its rationale for this approach:

> Key to the legislation is the concept of public communication. It is this flow of information to the public which is central to the First Amendment, and which is highly vulnerable to the effects of governmental intrusiveness.
>
> The phrase "in connection with a purpose to disseminate to the public ... a form of public communication" reaches not only materials which are to be disseminated to the public or which contain information that is to be incorporated in a form of public communication, but also materials which are gathered in the course of preparing such a publication, yet are at some point determined to be unsuitable for publication. For example, a reporter may prepare an article which his editor decides should not be published; nonetheless the reporter's interview notes and draft of the article would remain protected by the statute...
>
> The term "form of public communication" is designed to have a broad meaning. The fact that a local newspaper, for example, has a small circulation does not preclude application of the statute to searches of the files of the newspaper.24

The testimony of then-Assistant Attorney General Philip B. Heymann of the Department of Justice's Criminal Division is particularly illustrative of the problems inherent in categorizing journalists:

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22 42 U.S.C. Section 2000aa(a),(b) (1980).

23 S. Rep. No. 874, 96th Cong. 2nd Sess. 9, Privacy Protection Act of 1980 (emphasis added).

24 Id., at 10 (emphasis added).

> The materials which are protected from search and seizure...are described as those which are "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." Thus the protections afforded by this portion of the bill extend not only to the institutional press, but to academicians, authors, filmmakers, and free lance writers and photographers. While we had considered the option of a press-only bill, this format was rejected partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because the First Amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effects of governmental searches as are those of members of the news media.[25]

If journalists can not be defined for the purpose of protecting information in their possession, it does not follow that they can be defined for the purpose of obtaining information in the government's possession. If Congress and the Department of Justice have never been able to define or categorize journalists, it is unfair to expect your agency to resolve it in a few days or to rely on the Office of Management and Budget which had just a few months to review this matter.

The FOIA is a primary means for fulfilling the goals and protections of the First Amendment. Congress's fact-finding and determinations on the crucial issue of protecting those engaged in First Amendment activity from searches and seizures should guide your agency in its drafting of a final rule which will determine who is "contributing significantly to public understanding of the operations or activities of the government,"[26] which is precisely what those engaged in First Amendment activity do.[27]

III. This proposed rule could cause anti-competitive effects

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[25] Privacy Protection Act: Hearings on S. 115, S. 1790, and S. 1816 Before the Comm. on the Judiciary, 96th Cong., 2nd Sess. 51 (1980) (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice) (emphasis added).

[26] The Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Cong. Rec. H11233 (daily ed. Oct. 17, 1986) (to be codified at 5 U.S.C. Section 552(a)(4)(A)(ii)(III))

[27] See Blasi, The Checking Value in First Amendment Theory, 1977 Am.B.Found.Res.J. 521.

Journalists who work for newspaper, magazine, television and radio stations can easily prove that they do so and thus more easily qualify for fee reductions. Freelancers have a more stringent standard to meet in showing that they have a "solid basis for expecting publication through that organization." They also do not have the financial and legal resources of reporters who work for news organizations to make this showing, especially if an agency disputes it. This puts journalists who have one, full-time regular employer in a more advantageous position over journalists who split their time working occasionally for one publisher or simultaneously for several publishers.

These guidelines will place full-time journalists in a preferred class, and thus these guidelines comprise the start of a de facto licensing system since full-time journalists are easily identified and receive special advantages. This would certainly be strange since the federal government does not often intrude upon the power of the states to license and regulate professionals.28 Such a result would be even more unfortunate since it would be the work of an administration which has committed itself to deregulation.

Furthermore, freelancers sometimes work up stories which they submit to different publications and book publishers to see who will give them the best offer. The requirement that they must show a "solid basis for expecting publication" might deter freelancers from contacting more than publisher on a story since the government can attempt to verify their "solid basis" by contacting prospective publishers after forcing freelancers to disclose that information. In order to prove his "solid basis," a freelancer might be forced to sell his story to a publisher who is not offering him the best proposal since he could be forced to pay substantial sums for FOIA requests while looking for other prospective publishers. Thus, this proposed rule could act as a

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28 Tenth and Fourteenth Amendment considerations arise when professions are regulated. While the federal government sometimes regulates professions and businesses which are also regulated by the states, it would be a legal rarity for the federal government to begin regulating a profession which not one state has yet regulated. U.S. Const. amend. X, amend. IV. This state of affairs is perhaps best explained as follows: "Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press." Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (Stewart, J., dissenting).

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restraint of trade on freelancers. Restraints of trade are antithetical to any postulation and support of free markets.

IV. Requesting this information may violate the Paperwork Reduction Act

Your definition opens the door to obtaining a requester's contract for publication. This could easily include correspondence and memoranda with editors to prove that the requested documents also meet your definition of "news," even if the requester works for a news media organization and is not a freelancer. Your proposed rule does not state how your agency plans to "reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency ...."[29]

Indeed, this section as written encourages your agency to seek more and more information from a requester who is a representative of the news media. This is another reason why your definition of "news" should be stricken and your definition of "freelance journalist" should be revised.

Conclusion

I urge that this proposed rule be redrafted as outlined in this letter. I especially recommend that news media representatives should not be classed under a definition that examines a requester's employer or his contractor relationship but rather on the type of activity in which the requester is engaged. If the government can use commercial activity as a yardstick in these guidelines, it can certainly use First Amendment activity as a yardstick. First Amendment activity has been amply defined Congress in such areas as the Privacy Protection Act of 1980, and the Department of Justice has concurred in that definition.

The FOIA exists to give the public the information which it needs to govern the nation. The press has a special status as the public's representative. The FOIA should not be regarded as merely another government "service," nor should FOIA regulations be used as a bureaucratic club which can be used both to frustrate citizens exercising their rights and permit the government to pry further into their lives. In this Bicentennial of our Constitution, we should not let important national principles become lost in paragraphs of regulations.

Similarly, the work of Congress and the intent behind these FOIA amendments must be remembered. Inappropriate and unnecessary regulations should not frustrate these aims. Rep. English already has announced that his Subcommittee on Government Information,

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[29] 44 U.S.C. Section 3507(b) (1980).

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Justice, and Agriculture will hold hearings this fall to monitor the new FOIA regulations of agencies. He stated recently in announcing the creation of a FOIA oversight program, "Federal Watch," that he will be scrutinizing regulations that "might threaten to undermine the FOIA ... the time for playing games is over. If I find that agencies are drafting guidelines that treat reporters or public interest groups as commercial users, then the responsible agency officials will be held accountable in my subcommittee." Sen. Leahy likewise is considering holding Senate committee hearings on new agency regulations.

If I may provide further information or answer any questions about issues raised in this letter, please do not hesitate to contact me.

Sincerely yours,

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Xc: The Hon. William Webster,
Director of Central Intelligence
(Via First Class Mail)

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